In *R* v *Bland*,[3] the appellant was charged with possession of a controlled drug with intent to supply. The prosecution case against her relied solely on the fact that she was living with Ratcliff at a time when he had undoubtedly dealt in drugs. At the close of the prosecution case, counsel for the appellant submitted that there was no evidence to go before the jury. However, counsel for the Crown submitted that it was open to the jury to find that the appellant knew what Ratcliff was doing and that she had acted, not as principal, but as one who had lent passive assistance. The recorder rejected the defence submission; the appellant was convicted the appealed against conviction. In allowing the appeal, the justices of the Court of Appeal Criminal Division held that:

> The fact that the appellant and Ratcliff lived together in the same room was not sufficient evidence from which the jury could draw such an inference. There was sufficient evidence from which the jury could have inferred knowledge on the appellant's part that Ratcliff was drug-dealing, but no more. Assistance, though passive, required more than mere knowledge; for example, it required evidence of encouragement at least, or of some element of control, which was entirely lacking in the case. The case should have been withdrawn from the jury.

The onus of proving a criminal charge against both appellants in a joint trial always lies with the prosecution. In *R* v *Abbott*,[4] at p 899, it was held that:

> If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty.

In the present case we are of the view that although it is unfortunate that a guilty party cannot be brought to justice, it is more important that there should not be a miscarriage of justice and the law should be maintained that the prosecution should prove its case.

Appeal allowed.

Solicitors: *Fernandez & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Lam San

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-59-91
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
23 SEPTEMBER 1991

Evidence — Evidence of chemist — Charge of trafficking in dangerous drugs — Evidence of chemist that package found contained heroin — How trial court should approach evidence of chemist

Criminal Law — Dangerous drugs — Trafficking in — Evidence of chemist — How evidence should be approached

In this case, the respondent had been charged for trafficking in drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. Evidence was given that when the police raided a house, a package was found near the respondent which package was subsequently certified by the chemist to contain 34.81g of heroin. The learned trial judge found the evidence of the chemist 'sketchy' and 'unsatisfactory' and doubted the accuracy of the weight of the heroin analysed. At the close of the prosecution case, the learned trial judge amended the charge to one of possession. The respondent pleaded guilty to the amended charge and was sentenced to 11½ years' imprisonment and ten strokes of the rotan. The public prosecutor appealed.

Held, allowing the public prosecutor's appeal:

(1) In regard to the evidence of the chemist, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory. The evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.

(2) The doubt entertained by the learned judge in this case was not arrived at on reasonable or rational grounds and the test he applied to the evidence of the chemist on the question of the weight of the drugs was a misdirection.

(3) The appeal should be allowed and the case remitted to the learned judge to call for the defence.

[Bahasa Malaysia summary

Di dalam kes ini, responden telah dituduh mengedar dadah, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Keterangan diberi bahawa, apabila polis menggeledah suatu rumah, telah terdapat satu bungkusan dekat dengan responden. Bungkusan itu kemudiannya telah diperakui oleh pakar kimia mengandungi 34.81g heroin. Hakim yang arif yang membicarakan kes itu telah memutuskan bahawa keterangan yang diberi oleh pakar kimia tidak lengkap dan tidak memuaskan; ketepatan berat heroin adalah diragukan. Selepas kes bagi pihak pendakwa tamat, hakim yang arif itu telah meminda tuduhan kepada tuduhan milikan. Responden telah mengaku salah kepada tuduhan yang dipinda itu dan ia telah dihukum penjara selama 11½ tahun dan sepuluh pukulan rotan. Pendakwa raya telah membuat rayuan.

Diputuskan, membenarkan rayuan pendakwa raya itu:

(1) Berhubung dengan keterangan pakar kimia, kecuali jika keterangan itu dengan sendirinya begitu mustahil sehinggakan tidak ada orang yang munasabah yang boleh mem-

percayai kebenarannya, keterangan itu hendaklah diterima sebagai keterangan prima facie. Selagi keterangan itu boleh dipercayai, tidaklah perlu bagi pakar kimia itu menunjukkan secara mendalam apa yang telah dibuatnya di makmalnya. Keterangan pakar kimia di dalam kes ini adalah mencukupi sebagai asas untuk memanggil pembelaan jika semua unsur-unsur lain kesalahan itu telah dibuktikan.

(2) Keraguan hakim yang arif di dalam kes ini tidak timbul dari sebab-sebab yang munasabah atau rasional dan ujian yang digunakan oleh beliau terhadap keterangan pakar kimia tentang soal beratnya heroin itu adalah suatu salah arahan.

(3) Rayuan hendaklah dibenarkan dan kes dikembalikan kepada hakim yang arif untuk memanggil pembelaan.]

Case referred to
1 *Munusamy* v *PP* [1987] 1 MLJ 492 (folld)

Legislation referred to
Dangerous Drugs Act 1952 s 39A, B(1)(a)

Appeal from: Criminal Trial No 47-4-91 (High Court, Muar)

Dato' Stanley Isaac (Deputy Public Prosecutor) for the appellant.
Teh Poh Teik for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The respondent was originally charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 34.81g of heroin at No 84 Jalan Hashim, Muar, Johor. It was in the prosecution evidence that when the police raided the house at the address stated in the charge, a package containing what subsequently was certified by the chemist to be heroin was found near the respondent. At the close of the prosecution case the learned judge amended the charge to one punishable under s 39A(2) of the Act. The respondent pleaded guilty to the amended charge and was sentenced to 11½ years' imprisonment with effect from the date of his arrest and the mandatory ten strokes of the rotan.

There is really only one issue in this appeal by the public prosecutor. We are to concern ourselves only with the question whether on the evidence adduced it was correct and proper for the learned judge to amend the charge as he did after the close of the prosecution case. It was the contention of the public prosecutor that the learned judge erred in law and in fact when he concluded that the evidence of the chemist ('PW5') was 'sketchy' and 'unsatisfactory' and therefore unacceptable.

In his brief written grounds of judgment, the learned judge set out the reasons for his opinion for not accepting the evidence of the chemist as follows:

(a) There was no evidence as to why or how the chemist found the plastic packet to contain 75.18g of greyish brown substance. There was also no evidence as to whether the chemist used an instrument for weighing the substance or if he did so use an instrument, how that instrument worked and whether it was in proper working order and duly serviced.

(b) There was no evidence as to how the analysis was conducted or as to who conducted the analysis to the end that the chemist found the substance to contain 34.81g of heroin.

The rest of the reasons set out would appear to reflect the doubt in the mind of the learned judge as to the accuracy of the weight of the heroin so as to invoke the presumption of trafficking under s 37(da)(i) of the Act.

To see whether the learned judge was justified in entertaining the doubt in his mind, we have to look at the evidence of the chemist. For convenience the relevant parts of the evidence in examination-in-chief of the chemist are reproduced below.

> SD5: Chang Eng Thuan a/s in English. 44 years old. Director of Chemistry of the State of Johor.
>
> Obtained BSc (Hons) in Chemistry from UM Chartered Chemist C Chem. Awarded Fellow Royal Society of Chemistry FRSC from England. Fellow Malaysia Institute of Chemistry MMIC. Now serving as council member in that institute. Represented Malaysia to attend the UN Narcotic Expert Group. Served in Dept of Chemistry for 22 years. I have testified as expert witness in many court cases. My evidence has all the time been accepted by the court.
>
> ...
>
> All these envelopes sealed with police seal 'Polis Di RM 178'. I examined all the nine exhibits. In envelope 'A' I found a plastic packet in which was a Chinese newspaper packet containing another plastic packet containing 75.18g of a greyish brown substance which, on analysis, I find to contain 34.81g nett of heroin.
>
> Heroin is a dangerous drug as defined in s 2 of the DDA.
>
> ...
>
> The colour and texture of the contents of ID8C are different from the time when I carried out the analysis. This is because when I carried out the analysis I had to powder the greyish brown substance into very fine powder for homogeneity of the analysis, to obtain an accurate result.
>
> ...
>
> In this case the percentage of error of heroin quantitative analysis is +/- 1.0567% and I have given full benefit of the doubt to the accused by subtracting 1.0567% from the percentage of heroin which I obtained from my analysis. The error would be positive or negative. We give benefit to the negative error.

In cross-examination the chemist said:

> From ex 8C I cannot remember exactly but I think I took out about 10g for the purpose of analysis.
>
> There is no record in my work sheet of my having taken out a quantity of the substance for my analysis.

In re-examination he said:

> For the purpose of analysis the practice is to take out more than 10% of the weight of the sample for the analysis.

What seems clear from the grounds of judgment is that the learned judge was satisfied with the other evidence for the prosecution. The learned judge was also satisfied that PW5 was an expert and competent to give the evidence. It would seem that what the learned judge was not satisfied with was the manner with which the chemist came to his conclusions.

Looking at the evidence of the chemist in its totality, we found it difficult to accept the doubt of the learned judge at the close of the prosecution case to be a doubt arrived at on a rational basis. PW5 was a highly qualified chemist who had served the Department of Chemistry for 22 years and had testified as an expert witness in many court cases.

As to how a trial court should approach the evidence of a chemist, we wish to advert to the judgment of this court in *Munusamy* v *PP*[1] where in a passage at p 496F, Mohamed Azmi SCJ on behalf of the court put in focus the function of the chemist in a trial of this nature:

> We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

In our view, the evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.

The evidence of the chemist must be looked at in its totality. Seen in its totality, the evidence of the chemist in this case is not sketchy at all. There is no need for him to say what instrument he used for the purpose of the analysis or that the instrument was in good working condition as we have to assume until the contrary is shown that he had the proper instrument to carry out his work. In this case he had even gone to the extent of giving a margin of error and had given the benefit of the doubt to the respondent.

In his grounds of judgment the learned judge adverted to an earlier case dealt by him in Criminal Trial No 47-2-89. On examining his written judgment in that case (part of the appeal record), the learned judge indicated in the judgment that the chemist must satisfy not only the nature or identity of the exhibit but also its weight which is a crucial ingredient to invoke the presumption of trafficking. In the present case, he amended the charge at the close of the prosecution case to one of possession which can only mean that he was satisfied with the nature or identity of the exhibit (heroin) but had doubt in his mind as to the weight of the exhibit. But, in our view, if he doubted the analysis itself as clearly seen in his grounds, the same queries he raised would equally apply to the nature or identity of the exhibit.

Therefore, in our view, the doubt entertained by the learned judge was not arrived at on reasonable or rational grounds and the test he applied to the evidence of the chemist on the question of the weight of the drugs was a misdirection.

We accordingly allowed the appeal and directed that the case be remitted to the learned judge to call for the defence.

Appeal allowed.

Solicitors: *Abdul Raman Saad & Associates.*

Reported by *Prof Ahmad Ibrahim*